

Commission on Health and Safety and Workers' Compensation

**MINUTES OF MEETING
February 24, 2005
Elihu M. Harris State Building
Oakland, California**

In Attendance:

Chair John Wilson
Commissioners Allen Davenport, Alfonso Salazar, and Kristen Schwenkmeyer,
Angie Wei
Executive Officer Christine Baker

Not in Attendance

Commissioners Leonard C. McLeod, Robert B. Steinberg, Darrel "Shorty" Thacker

Call to Order / Minutes from the December 10, 2004, Meeting

Chair John Wilson called the meeting to order at 10:00 a.m.

Chair Wilson welcomed new Commissioner Angie Wei who represents labor in the position formerly held by retired Commissioner Tom Rankin Commissioner. Wei was appointed to CHSWC by President Pro Tempore of the Senate Don Perata.

Chair Wilson stated his appreciation, on behalf of CHSWC, to those in the workers' compensation community who expressed their support for CHSWC in response to the Governor's proposal to abolish Boards and Commissions. Chair Wilson stated that the Little Hoover Commission got more letters in support of CHSWC than any other Board or Commission and that the decision to maintain CHSWC was due in large part to the strength of this support.

Chair Wilson asked for a motion on the draft minutes of the December 10, 2004, Commission Meeting.

CHSWC Vote

Commissioner Davenport moved to approve the minutes of the December 10, 2004, meeting. Commissioner Wei seconded, and the motion passed unanimously.

Status Update on DWC Regulations

Minerva Krohn, Division of Workers' Compensation (DWC)

Ms. Krohn provided an update on the following DWC projects:

- Permanent Disability Rating Schedule
 - Emergency regulations became effective January 1, 2005.
 - Notice of rulemaking has been published.
 - Public hearing is scheduled for April 4, 2005, in San Francisco.

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- Medical Provider Networks
 - Emergency regulations became effective November 1, 2004.
 - Notice of rulemaking was published and a hearing held on February 2, 2005. The 15-day comment period ends February 24, 2005.
- Independent Medical Review
 - Emergency regulations became effective January 1, 2005.
 - The notice of rulemaking has been published.
 - Public hearing is scheduled for March 16, 2005, following the 45-day comment period.
- Utilization Review
 - Emergency regulations became effective December 13, 2004.
 - The notice of rulemaking has been published.
 - Public hearing is scheduled for March 22, 2005, in San Francisco, following the 45-day comment period.
- Supplemental Job Displacement Benefit
 - Public hearing was held in July 2004.
 - Notice of modification of proposed text of the regulation was sent out for 15-day comment period which ends on March 3, 2005.
- Predesignation of Personal Physician
 - Regulations are being drafted.
 - Advisory Committee Meeting has been scheduled for March 28, 2005, to take public comment on drafting of these regulations.

Ms. Krohn stated that any information on the rulemaking can be obtained on the website, www.dir.ca.gov; click on rulemaking- proposed regulations.

Briefing on Apportionment

Lach Taylor, Workers' Compensation Judge, CHSWC

Judge Taylor presented information about the effect of Senate Bill (SB) 899 on the law of apportionment as a summary of the "Report on Effect of SB 899 on Law of Apportionment" by CHSWC Legal Consultant Larry Swezey. He explained that apportionment is the determination of how much of a permanent disability is compensable and how much is not compensable. Apportionment should not be confused with whether the injury itself is compensable. Apportionment only applies to permanent disability that is at least partially the result of the compensable injury.

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Judge Taylor stated that on April 19, 2004, SB 899 repealed Labor Code Sections 4663, 4750, and 4750.5 of the California Labor Code that defined apportionment. He further stated that to understand the effect of the new statutes, it is important to look at what they replaced. Judge Taylor reviewed these sections:

Section 4663 stated that if a pre-existing disability was aggravated by an injury, then the compensation was allowed only for the portion of the disability due to the aggravation. This Section required the employee to prove that part of the disability would have existed even without the industrial aggravation.

Section 4750 stated that the employee has the responsibility to prove the pre-existing permanent disability and then the employer was liable only for the portion of the disability due to the industrial injury.

Section 4750.5 concluded that if a non-industrial injury happened after the industrial injury, the employer was liable for the consequences of that.

Judge Taylor stated that prior to the reform legislation being enacted, there was no apportionment for pathology, only for disability. With the change in legislation, apportionment is now based on causation. It is a conclusive presumption, presuming that once the employee has had a prior award, the disability is presumed to exist. For example, if the employee had a prior 50% back disability and has gone back to work and then has another 20% back injury, the 50% would be deducted.

Judge Taylor stated that it will now be easier to determine apportionment when there are independent causes that contribute to the outcome, such as smoking and asbestos, as each of those effects are well studied and have some predictable propensity to cause disability. In other cases, it will be harder for judges to weigh the relative contribution of a pre-existing condition and the injury to the disability.

Another effect of the repeal of Section 4750, Judge Taylor stated, is the repeal of the *Wilkinson* doctrine. This doctrine stated that where multiple disabilities to the same part of the body become permanent and stationary at the same time, the employee is entitled to one award. This is important because two partial awards are worth less than one award. Without Section 4750, it is more likely that the injured employee will get two separate awards.

Judge Taylor stated that there are practical decisions that need to be made now. First, physicians are asking how to write reports. The AMA Guides contain some discussion of causation which followed what caused the injury and the underlying condition. Judge Taylor discussed the "but-for" principle, that there has to be a connection between the injury and the underlying condition. He added that we need to ask physicians to address these issues as thoroughly as possible.

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Judge Taylor commented that in the Report, Judge Swezey has suggested some possible instructions to physicians. Without judicial guidance, the Administrative Director (AD) of the DWC may not be able to adopt these instructions to physicians as rules. He then stated that if the Commission adopts the paper, there is some likelihood that there will be discussion of the issue that will be citable which might shed light on the subject.

Another practical consideration, Judge Taylor commented, is to measure the effects of changes in apportionment. He added that an intention of SB 899 was to save money for employers because of the crisis in insurance costs. To provide the full benefit for employers, it is important to measure changes and make sure that insurance companies pass along the cost savings. The current estimate of savings from SB 899 was that approximately 3 percent of the permanent disability costs system-wide could be saved by this change to apportionment.

Questions and Comments

Commissioner Wei asked whether there is any guidance for doctors on apportionment. Judge Taylor responded that there is no official guidance for doctors at this time but he referred to Mr. Swezey's discussion in the memorandum on "Effect of SB 899 on Law of Apportionment." Judge Taylor further stated that he has checked the Medical Director's website and there are no new authoritative regulations for physicians on this subject. Advocates from each side who believe that they have an accurate interpretation are putting out their interpretation to physicians.

Mark Gerlach, representing the California Applicants Attorneys Association (CAAA) stated that the Workers' Compensation Appeals Board (WCAB) has asked for public comment from the workers' compensation community several months ago about this issue of what causation means. He further stated that the applicants' attorneys and others in the workers' compensation community have addressed this issue with the Appeals Board, which should be coming out with some guidance shortly.

Mr. Gerlach then stated that the applicants' attorneys association strongly disagrees with many of Judge Taylor's comments. Labor Code Section 4663 states that the physician's report should address the issue of causation of permanent disability. As Judge Taylor pointed out, there is a significant difference between causation of the injury and causation of the permanent disability. Mr. Gerlach stated that the AMA Guides address the causation of the injury analysis but not causation of the permanent disability. He commented that these issues should not be addressed by physicians as that will result in arbitrary and subjective decisions, which in turn, will be the worst outcome possible for employees and employers. Mr. Gerlach commented that the WCAB has asked for comments from the workers' compensation community on the issue of apportionment. He emphasized that CHSWC should look at the WCAB decision on this issue before proceeding to issue any instructions that would be looked at by physicians, judges, or

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anyone else. He also emphasized that CHSWC should study the ramifications on the system by this type of analysis.

Judge Taylor asked Mr. Gerlach if he knew when the WCAB decision would be coming out. Mr. Gerlach responded that he did not know. Generally, in the past, if the Appeals Board asks for comments from the community, that is a signal that the Board has a case in front of it in which that issue needs to be decided. Mr. Gerlach then stated that it may take weeks or months for the Appeals Board to issue a decision, as any decision would go through multiple drafts before the *en banc* decision would be issued.

Christine Baker stated that one of CHSWC's ongoing responsibilities and part of the Commission's strategic plan is to monitor and evaluate the impact of reforms. She commented that CHSWC staff can conduct a sampling study of the decisions that are coming out of the appeals Board to determine cost savings, cost benefits, and key issues on apportionment. This study could be done effectively with existing resources.

Chair Wilson replied that this is an important issue. This is a first reading of the paper and there have been some good comments from the applicants attorneys; however, CHSWC should hear from others as well. Chair Wilson suggested that the paper should therefore be put out for the public with a request for response. He concluded by stating that this paper has a lot of important detail and should be a useful document.

Chair Wilson asked for a motion to release the report for public comment.

CHSWC Vote

Commissioner Wei moved to approve that the report "Effect of SB 899 on Law of Apportionment" be released for public comment, and Commissioner Salazar seconded. The motion passed unanimously.

Proposed Evaluation Study on Effects of Apportionment

Judge Taylor stated that currently there is a proposal to measure the early effects of the change in apportionment by taking a sample of findings, approximately a dozen awards, from offices across the state. He stated that the plan is to review files at a couple of the district offices to see if the sampling method is accurate and if so, to request files from each office to see if there is a noticeable shift in the way apportionment decisions are being made since SB 899. About a dozen files from each of the selected offices will be reviewed.

Commissioner Wei asked if the evaluation study would be limited to only the cost-savings side of the issue or whether it would also include the process behind apportionment. Judge Taylor responded that the primary purpose of the evaluation study will be to determine that the savings that insurers are getting will be immediately effective. Ms. Baker added that any study can reveal other areas for improvement and

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thus the study would also look at the process behind apportionment. She asked CHSWC to approve proceeding with the evaluation study.

CHSWC Vote

Commissioner Salazar moved to proceed with the evaluation study, and Commissioner Wei seconded. The motion passed unanimously.

Peggy Sugarman, from Voters Injured at Work.org, commented that she would like to request an opportunity to comment on the methodology used for the study.

Proposed Revision to “Workers’ Compensation in California: A Guidebook for Injured Workers”

Juliann Sum, Labor Occupational Health Program, UC Berkeley

Ms. Sum discussed proposed revisions made to the “2002 Workers’ Compensation in California. A Guidebook for Injured Workers.” The proposed revisions incorporate changes of recent workers’ compensation reform legislation. This revised guidebook aims to provide accurate, realistic, and practical information, including different interpretations of legislation and proposed regulations. It will incorporate changes in the law through January 2005 and will include additional information to reflect the changes in Supplemental Job Displacement Benefit regulations of February 2005. Ms. Sum stated that ongoing addenda will be posted online to keep this publication current.

Ms Sum then identified the scope of the changes to the guidebook, which includes information on predesignation, medical treatment, dispute resolution, return to work, permanent disability ratings -- especially the 15% bump up, bump down -- and the supplemental job displacement benefit.

Ms. Sum also commented that they are soliciting translation services to produce the guidebook in Spanish in a short turnaround time so that it will not be outdated.

Commission Schwenkmeyer asked if Spanish is the only other language that the guidebook will be translated into. Ms. Sum responded that this was the only language provided for in the contract. To translate it into other languages, additional funding would be necessary.

Commissioner Davenport asked what the cost would be for the translation into Spanish. Ms. Sum responded that bids coming in for the translation were indicating that it would be between \$5,000 and \$10,000.

Chair Wilson asked whether the guidebook would be produced only online or whether there would be printed copies available and whether there would be any limits on distribution. He also asked if this is the second edition of the 2002 Guidebook.

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Ms. Sum responded that in 2002, there were several materials published in addition to the guidebook, including fact sheets (1998) and a video (1998). The guidebook is an online document due to resources available.

Ms. Sum reviewed the history of materials for this guidebook and of the fact sheets and video for injured workers. She stated that she worked on the revised guidebook with Ms. Baker and Judge Taylor and also asked members of the workers' compensation community for comments.

Chair Wilson asked if there will be adjustments as things change. Ms. Sum responded that the guidebook will indicate that there are changes through the publishing date. In addition, there are caveats throughout the guide that indicate the date that the information is effective and that addenda will be issued to include changes.

Chair Wilson asked if people can go to the website and download the guide without any limits. Ms. Sum responded that they could.

Commissioner Wei said that the guidebook was an impressive document and mentioned that the DWC is starting to hold open house meetings for injured workers. She asked whether this document could be available at these open house events.

Ms. Baker stated that the guidebook and other CHSWC materials have been used extensively at the Information and Assistance Offices and by the District Offices. Commission materials are also available on the DWC website. Ms. Baker also stated that CHSWC might have some funds left over at the end of the year to enable CHSWC to make available some hard copies of the guidebook.

Commissioner Wei further stated that predesignation is an important issue and she would like to be sure that the addenda to the guidebook are clear about new regulations on predesignation. Ms. Sum responded that predesignation rights are undergoing drafting and public comment and that they may be changed shortly. She stated that she will put a note into the current guidebook to check for the latest guidance.

CHSWC Vote

Commissioner Davenport moved to approve the proposed revisions to the "Workers' Compensation in California: A Guidebook for Injured Workers," and Commissioner Wei seconded. The motion passed unanimously.

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Presentation on Spinal Surgery Second Opinion Process

Frank Neuhauser, Survey Research Center, UC Berkeley

Frank Neuhauser welcomed Commissioner Wei. He explained that CHSWC was asked under statute to review the second opinion process and present findings by June 30, 2006. As part of that process, CHSWC arranged for researchers at the UCLA School of Public Health to work with him on a preliminary report on the spinal surgery the report. This is the first report on this subject.

Mr. Neuhauser stated that he will discuss hospital costs in general and back surgery frequency costs in specific to determine whether California looks different from the nation in these areas and whether there are any areas of California that are even worse. He commented that he would also talk about both the spinal surgery second opinion process and access to care for injured workers who need to use this process. He further stated that he would present preliminary conclusions and recommendations for CHSWC to consider as the report goes forward over the next year.

Mr. Neuhauser stated that the data cover hospital costs based on paid amounts for inpatient and outpatient hospital costs. The data, which have been collected by the Workers' Compensation Insurance Rating Bureau (WCIRB), show that hospital costs have increased over 160% over the past six years, 1998-2003, despite a lack of increase in both workers' compensation admissions and admissions for back injuries. For the study, the Office of State Health Planning and Development (OSHDP) database on hospital discharge data was used. The data cover all hospitalizations, providing demographic and patient characteristics, as well as information on who was the payor.

Mr. Gerlach asked if this information was for inpatient cases. Mr. Neuhauser replied that OSHPD data are on inpatient hospital care solely.

Mr. Neuhauser stated that the increase in hospital care has been driven almost exclusively by outpatient procedures at outpatient surgery centers and free-standing clinics. The growth in this area has been 121% over the six years 1998-2003.

Commissioner Wei asked if there are data on the number of outpatient spinal surgeries. Mr. Neuhauser responded that the data indicated the number of spinal surgeries for inpatient care. He explained that no detailed data exist for outpatient procedures in part because there is no standard to way to code them. Some sampling was done, but this would not provide accurate data. Moreover, he stated that it is unlikely that spinal surgeries could be done on an outpatient basis.

Mr. Neuhauser pointed out that there is a breakdown of inpatient procedures into close to 500 diagnostically-related groups (DRGs). The severity of these surgeries is also indicated. The data indicate that inpatient procedures increased by about 600% between 1998-2003.

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Mr. Neuhauser raised the question of why spinal surgery is treated differently from other injuries. A national database, the Medical Panel Expenditure Survey, by the Agency for Healthcare Quality, which is the Medicare umbrella, has collected data over a two-year period on Americans of all ages and followed all aspects of their healthcare. Mr. Neuhauser stated that there appears to be no difference on a national basis between those who receive non-occupational vs. occupational back injuries. The data show that for non-occupational injuries in California, there are less actual surgeries than expected, which is probably due to the fact that California has a much heavier penetration of managed care, as well as more conservative utilization than the rest of the country.

Commissioner Davenport asked if Mr. Neuhauser could explain the statement that there were less actual surgeries than expected. Mr. Neuhauser replied that the data represent the percentage of back injuries where spinal surgeries are expected. Mr. Neuhauser replied that you have to look at the national OSHPD data to estimate the number of spinal surgeries.

Commissioner Davenport asked if the estimated data were for California. Mr. Neuhauser responded that it was. Commissioner Wei asked if the data were per year, and Mr. Neuhauser responded that it was. Commissioner Davenport then asked if the data show that more people are getting surgery than you would expect. In response, Mr. Neuhauser stated that there are somewhat fewer surgeries than expected on the non-occupational side, but on the occupational side, there are more surgeries than expected, by a factor of 2 or 3. This indicates that the California workers' compensation system is more likely than other states to define an occupational back injury as needing spinal surgery.

Mr. Neuhauser stated that the data indicate that if you are located in close geographic proximity to back surgeons, you are 20% more likely to have back surgery than if you are located further away. This shows that treatment is being delivered differently across the state.

Commissioner Davenport asked whether this would also be true of healthcare in general. Mr. Neuhauser responded that this was true in general. California Workers' Compensation Institute (CWCI) data collected have been in a managed care controlled environment, but workers' compensation is not in that same environment.

Mr. Neuhauser indicated that there is a trend toward much more invasive surgeries with very high short- and long-term disability costs and poor outcomes observed for workers.

Commissioner Wei asked if the data were only for Washington State, and Mr. Neuhauser replied that it was.

Mr. Neuhauser stated that the second surgery opinion process was introduced by legislation to be available to employers and insurers objecting to a recommendation of

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spinal surgery by the personal treating physician (PTP). The DWC selects six physicians from a list of qualified spinal surgery physicians; an in-person evaluation is not required for this process unless the second opinion disagrees with the recommendation of the treating physician. In addition, if the second opinion disagrees with the first, then the employer needs to file a Declaration of Readiness and proceed to an expedited hearing.

Mr. Neuhauser pointed out that since the spinal surgery second opinion process began in July 2004, there have been 604 requests for the procedure. Of about 6,000 spinal surgeries, only 1% had a second opinion returned on them. One of the reasons for the low return rate for the panels actually sent out, Mr. Neuhauser stated, may be that the current panel of second opinion physicians is limited by size and geography.

Commissioner Davenport asked if the data show that there are no back surgeons in Madera County, and Mr. Neuhauser responded that the data show that there are no back surgeons in Madera County who have agreed to be on the spinal surgery second opinion panel. Mr. Neuhauser pointed out that in certain areas of the state, someone would have to travel between 30 and 100 miles to get to a back surgeon who was qualified and who agreed to be on the spinal surgery second opinion panel. The panel, concluded Mr. Neuhauser, is therefore too limited to supply sufficient access for injured workers without substantial travel. In addition, employers and workers in rural areas are not getting comparable choice as those in more urban areas.

Mr. Neuhauser reviewed the preliminary conclusions to the study, including: (1) spinal surgery appears to be much more heavily utilized in the California workers' compensation system than in workers' compensation systems nation-wide, as well as in non-occupational medicine nation-wide and even in California's non-occupational medical system; (2) especially invasive spinal surgeries are increasing rapidly; and (3) workers and employers need access to good medicine while being apprised of all the risks and the appropriateness of treatment. Mr. Neuhauser pointed out that approximately 10% of surgery recommendations may currently be referred to the second opinion process, but only about 1% received a second opinion. The issues in the low rate of second opinions may be due to unrealistic timeframes to obtain a second opinion and distance and access problems for workers.

Commissioner Wei asked for clarification about the 1% of the second opinion decisions. Mr. Neuhauser responded that the Department of Managed Care posts all of the decisions on its website and that CHSWC might want to consider a study of this information.

Mr. Neuhauser reviewed the preliminary recommendations, including that: (1) the panel of experts needs to be expanded geographically and numerically by outreach and recruiting by the DWC and by use of alternative vendors; (2) the DWC should consider ways to deal with requests missing the ten-day employer deadline by extending the time frame and allowing for penalties but not exclusions of requests that do not meet the deadline; (3) statute and regulations for the second opinion process need to be clarified

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within the medical provider networks; (4) follow-up needs to be done by the DWC to determine outcomes in cases that were assigned to second opinion doctors but where no report was received; and (5) results of second opinions should be tabulated and published by the DWC.

Mr. Neuhauser stated that a final, broader question for CHSWC would be whether the second opinion process adds anything that is not accomplished by the Qualified Medical Evaluator (QME) process that is already in place for expedited hearings.

Commissioner Wei asked whether an employee can request a second opinion in addition to an employer requesting a second opinion. Mr. Neuhauser responded that the process was originally set up for an employer to request a second opinion. Judge Taylor affirmed that this process was for the employer and that there were other avenues for the patient to question the physician's recommendation.

Chair Wilson asked if the increase in serious workers' compensation surgeries, those that require fusion, is also true of the non-occupational population. Mr. Neuhauser responded that in 2003, the probability for spinal surgery was half as likely for the adult non-occupational population as for the workers' compensation population. He stated that he was not sure of the trend. Chair Wilson asked that Mr. Neuhauser attempt to find out what the trend is in other states, as some of the medical data have indicated that the trend should be down, not up. Mr. Neuhauser stated that WCRI or groups like that would have national data on this issue.

Rich Beechum, an Applicants Attorney from Santa Rosa, asked if non-occupational back surgery patients had access to care and had medical insurance. Mr. Neuhauser responded that the data indicate that 16% of the adult working population in California is not covered for health insurance. Of that uninsured population, the number of surgeries is literally in the low hundreds. Lack of insurance coverage may be the reason why California has a lower number of non-occupational back surgeries than the rest of the nation which has a lower uninsured population.

Deborah Nosowsky, workers' compensation consultant, stated that it would be interesting to learn about the number of patients with repeat back surgery. In Washington State, the doctor has to provide a disclosure form to the employee, which the employee has to sign. Part of that disclosure form reports the outcomes from the surgery and alerts the employee that the surgery could result in a second surgery or more. About one half of back surgeries resulted in a second surgery. She suggested that Mr. Neuhauser look into how many of the California back surgery cases required a second surgery or multiple surgeries. Mr. Neuhauser replied that there might have to be a shorter window of about two years to see if there is a second surgery. Ms. Nosowsky commented that claims adjusters have cases where multiple surgeries occur.

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Chair Wilson asked what the next steps for this study would be. Ms. Baker responded that CHSWC has recently received a Memorandum of Understanding from the DWC in order to have access to spinal surgery second opinion decisions, and the Commission will continue its work in this area.

Tom McCauley from Republic Indemnity commented that one reason why utilization has not been as high as anticipated may not be due to availability of panelists but because of the general lack of knowledge and experience with the effectiveness of the second opinion spinal surgery process in the community in general. Some payors have used the lack of positive outcome from these types of surgeries, the lack of benefits to the injured worker, and the cost as arguments against the process, while some payors disregard these factors. Mr. McCauley suggested that issuing this report may cause some change in the patterns.

Mr. Neuhauser commented that it would be useful for CHSWC and DWC to contact at least a subset of people with second surgery requests to see what happened and what their view of the process is. He suggested that throwing up roadblocks for the injured worker to go through the process prevents them from proceeding through the process, while reconsideration of the treatment could be a good outcome. It would be important to hear from the doctor, the claims administrator and the worker.

Mr. McCauley stated that some payors in the community view the results of the data indicating that there are more surgeries in California and that the outcomes are not justified as reasons to question the process where the surgeries are the most invasive. That may explain the data about frequency more than the availability of panelists.

Commissioner Wei commented that CHSWC should consider that the second opinion spinal surgery provisions were adopted in SB 228, prior to SB 899 legislation whose which created medical provider networks and made changes to the utilization review and the QME process. She therefore questioned whether in this changed landscape, a second opinion process for back surgeries is needed and whether the medical provider network could take care of the concerns of employers about unnecessary services. Mr. Neuhauser responded that that is a good area for ongoing discussion. Judge Taylor stated that a lot of employers do not have medical provider networks so there is need for a procedure for those non-medical provider network cases. However, he further stated that since SB 899 brought out the single QME process which might achieve some of the efficiencies of the second opinion process, he also questions whether the second opinion process is needed.

Update on Small Employer Training Model

Diane Bush, LOHP, UC Berkeley

Ms. Baker then introduced Diane Bush from UC Berkeley. Ms. Baker stated that she had who attended the Worker Occupational Safety and Health Training and Education

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Program (WOSHTEP) Advisory Board meeting where WOSHTEP accomplishments and the Small Employer Training Model were discussed. Ms. Baker stated that the Advisory Group was very impressed with the small employer model and she wanted to share this with the Commission.

Diane Bush commented that the small employer training model was developed as part of the WOSHTEP program which was developed for employees. Small employers may not have the resources to send employees to the full training program to become Worker Occupational Safety and Health (WOSH) Specialists. Therefore, the small employer training model was developed, and it was decided to focus first on restaurants. Ms. Bush stated that targeting of restaurants is also a focus of the Young Worker Partnership.

Ms. Bush stated that the materials were based on successful training and education done by the Washington State Department of Labor and Industries and the statewide restaurant association. Those materials provided information for employers but not active training materials. The first step in developing the small employer training model for California was to work with the State Compensation Insurance Fund (SCIF) to put together a focus group of restaurant owners to learn what their needs were. The focus group stated that they wanted the training to be very short, to look at the restaurant as a whole, and to be easily tailored to their own restaurant.

Ms. Bush described the materials which provide a one-hour training program: one 30-minute module focusing on an activity, either a walk-through of the restaurant or a mapping activity, where the employees identify hazards in their restaurant and review tip sheets that focus on the main types of restaurant hazards; the other 30-minute module focusing on the employees identifying improvements to safety and health in the workplace. Ms. Bush stated that then a pilot training session was held which was successful. This was the first time that many employees in the pilot group had any training or information about safety and health in their own restaurants or had heard about these issues from employees in other restaurants.

The next step Ms. Bush described was a training-of-training workshop with 13 managers from 9 different restaurants. This was very successful and they are now contacting the managers to see what they have done with the materials. The next challenge will be to develop an outreach and dissemination plan to get the materials out to a wider range of restaurant owners and managers. They will continue to work in an informal partnership with the California Restaurant Association, SCIF, and Cal/OSHA Consultation.

Commissioner Davenport asked whether Ms. Bush had had experience with insurance brokers as part of this outreach program, since brokers should be instrumental in helping small employers save money. Ms. Bush responded that they will be and that there were insurance industry representatives at the WOSHTEP Advisory Board meeting who were very enthusiastic about this program. She further stated that the challenge of getting small restaurant owners and managers to attend training reflects their work situations and

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that the group did out reach to SCIF clients and restaurant association members, and a business association in Berkeley that all the local restaurants had to belong to. The lowest turnout was from the SCIF members since SCIF members are very small and they have very few resources to send people to longer training. She added that there are things that could be done to facilitate the small employers' attendance to the workshops. She stated that she hoped that they would also work with insurance brokers.

Chair Wilson commented that the WOSHTEP Advisory Board is working with the California Restaurant Association (CRA) that has an insurance program for their members which their smaller employers utilize. There is also a safety training program within the restaurant association that could provide an opportunity for the WOSHTEP program to work with CRA.

Commissioner Salazar asked if there were any incentives for lowering workers' compensation insurance for participating in these types of programs. Chair Wilson stated that State Fund representatives in the Advisory Board Meeting heard about this. Chair Wilson added that SCIF insures a high percentage of smaller restaurants and thus would be a good company to target in the area of incentives.

Executive Officer Report

Christine Baker, Executive Officer

Christine Baker presented the Executive Officer Report with an update on the projects since the last CHSWC meeting.

Proposed Fraud Study

She stated that at the request of the Fraud Assessment Commission (FAC) and on the advisement of the Commissioners, staff explored the feasibility of conducting a study on fraud detection in the California workers' compensation system. Staff met with a working group under the supervision of Chair Wilson and the William Zachry, Chair of the FAC. For that meeting, staff coordinated with Professor Sparrow of the Harvard Kennedy School of Government. Professor Sparrow wrote the book entitled "Licensed to Steal: How Fraud Bleeds America's Health Care System. Professor Sparrow espouses a systematic review of potential areas for abuse, and the methodology he suggests is a thorough examination on a representative basis.

CHSWC and the FAC would jointly participate on an RFP for start-up in July. The scope of the work would include provider abuse, employer premium abuse, and uninsured employer abuse. That would provide a good estimate of the extent of abuse in these areas and suggest the appropriate public policy to eliminate abuse. CHSWC staff is working on a scope of work and request for proposal, which is currently being reviewed by several experts. The next steps would be to identify several major areas for savings from such a study: for example, overpayments, underpayments, improper billings

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patterns, services not rendered yet bills submitted. This methodology is now being used by the Medicare/Medi-Cal system, and CHSWC will work closely with that team as well.

Ms. Baker asked for approval to proceed with the partnership with the FAC on this study. CHSWC has been invited to the March 9th meeting of the FAC and would present the concept of a joint study. The FAC would encumber monies in the July 1st budget. The FAC and CHSWC would share in the expense of the study with the FAC picking up the bulk of the cost.

CHWSC Vote

Commissioner Salazar moved to approve that CHSWC proceed with the partnership with the FAC on this study, and Commissioner Davenport seconded. The motion passed unanimously.

CHSWC Activities

Ms. Baker then discussed progress made in planning a forum on April 29, 2005, on the risk of terrorism and the impact on the workers' compensation system. CHSWC has partnered with RAND and the University of Southern California, which maintains a center on terrorism funded by Homeland Security. CHSWC would co-host the forum in southern California, which would be similar to the forum on permanent disability or carve-outs. All the Commissioners' interests and concerns will be considered. Guests, speakers and agenda will be available soon.

Ms. Baker then stated that CHSWC has developed a comprehensive proposal for a return-to-work study that the Commission approved and now hopes to move that through the Contracts Unit within the Department of Industrial Relations (DIR).

Ms. Baker also stated that CHSWC is working on the proposal of a study of the safety issues with public safety employees and the disability retirement system and is working with the National Institute of Occupational Safety and Health (NIOSH) on joint funding for this study.

Regarding the Commission's final permanent disability study by RAND, Ms. Baker stated that the study was sent to peer review, peer review changes have gone back to the researchers, and the final document should be available fairly quickly.

Based on discussions with former Chair Tom Rankin, Ms. Baker stated, the Commission is thinking about developing the idea of return-to-work resource centers that is still in initial stages.

Ms. Baker thanked the Commissioners for their support and stated that staff will continue to work diligently to produce the highest quality of research.

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Ms. Baker then stated that the entire staff has been working on redacting over 700 Disability Evaluation Unit files in order to do a joint study with the WCIRB and the University of California on changes to the Permanent Disability Rating Schedule. Data will be sent over the WCIRB which will contract the evaluation out to one of the most respected evaluators on AMA Guides.

Ms. Baker further stated that CHSWC received a public records request for any and all information regarding the Permanent Disability Schedule and is consulting with the legal department to be sure that the request is complied with appropriately.

On February 25th, Ms. Baker stated, she and Judge Taylor will be in Sacramento to provide a briefing to bi-partisan legislative staff on the workers' compensation system and the reforms. This was a request by the Senate Office of Research.

Ms. Baker concluded by stating that the staff had prepared a document based on data extracted from the annual report called "Principal Indicators in our Workers' Compensation System: A Report Card for Californians." These indicators will be updated as needed. The document will be posted on the website and made available to the legislative staff at the February 25th briefing.

CHSWC Vote

Commissioner Wei moved to approve the report entitled "Principal Indicators in our Workers' Compensation System: A Report Card for Californians," and Commissioner Schwenkmeyer seconded. The motion passed unanimously.

Commissioner Davenport asked Ms. Baker to comment on the recent carve-out forums. Ms. Baker stated that the Commission partnered with Kaiser Permanente and the Labor Federation to produce two highly successful forums in February, one in northern California and one in southern California. Chair Wilson and Commissioners Salazar and Wei attended. Over 150 participants, primarily from unions, participated. The Commission's Carve-Out Guide and other Commission documents served as valuable resources for those interested in the carve-out process.

Public Comments

Vancois D'Amoun, an injured worker, spoke about the many problems he has faced over eight years with the workers' compensation process and commented that he has not heard any discussion of fraud against injured workers. He stated that some of the problems he has experienced included having his file destroyed a day before he was to copy it and having a hearing scheduled before one judge being assigned to another. He further commented that his attorney has not helped him obtain his files and has delayed hearings. Mr. D'Amoun asked the Commission to explain where he can find help as an injured

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worker, someone who would look into his case and find out what is going on and the fraud that exists.

Chair Wilson asked Mr. D'Amoun who his employer is. Mr. D'Amoun replied that it is PG&E. Chair Wilson next asked if PG&E is a self-insured employer. Mr. D'Amoun replied that it is. Chair Wilson then asked who does the administration for PG&E, whether it is done by employees of PG&E or an outside firm. Mr. D'Amoun replied that his adjuster is from within PG&E.

Chair Wilson asked if he had been to an Information and Assistance Bureau. Mr. D'Amoun replied that he has. He stated that he had been sent to a fraud unit in Benicia, but it had nothing to do with workers' compensation.

Mr. D'Amoun then stated that he is incurring pain which causes increased blood pressure, yet his blood pressure medication has been cut off by the new AMA rules. He stated again that he would like to know where the help is for injured workers.

Dan Willis, General Manager of Grandpa's Compounding Pharmacy, spoke about how compounding pharmacists are being affected by changes in the workers' compensation system. He explained that a compounding pharmacy makes medications that manufacturers are not making and that this is often a last resort for a patient. He stated that compounding is done at the pharmacy and that legally, any pharmacist can do compounding but most do not. A separate license is required only for sterile compounding.

Mr. Willis described two different cases. The first is the situation of a California Highway patrol officer who had a back injury with inflammation and muscle spasms. The usual medication would affect cognitive ability and put him out of work. The compounding pharmacy has creams that cost under \$100 per month that relieve pain and relax muscles but do not affect cognitive ability. These creams could keep the officer at work.

Mr. Willis described another employee whose pain required Hydrocone, but had to avoid the Tylenol that is also in Vicodin. The pharmacy compounded the Hydrocone without Tylenol for her. This employee is now back to work.

The problem for the compounding pharmacy, stated Mr. Willis, is that Medi-Cal will only pay for the cost of ingredients. That means there is no profit and as a result, the compounding pharmacy cannot stay in business.

During the past year, the pharmacy has given away over \$100,000 worth of medicine knowing they would not get reimbursed. That represents the total profit for the past year. Mr. Willis stated that they considered charging the patient but learned from the Insurance Commissioner's office that they cannot do that without risking fines five times the price of the compounded medicine and a court case. They also considered pulling out of the program, but learned they cannot do that or they will incur a court case. As a result, they have chosen to cut people off in some cases. Mr. Willis commented that some insurance

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companies that are not yet using the new fee schedule are paying for their service, but that may not last very longer.

Mr. Willis acknowledged that coming up with a pricing schedule for compounding is difficult, and he offered to help work with a committee to figure out pricing. In the meantime, Mr. Willis stated that the highway patrol officer is not working and the lady with the Hydrocone is now using Oxycontin which is a \$12,000 per month. He then stated that the compounding pharmacy could save the state over \$200,000 per year.

Commissioner Wei asked where the compounding is done. Mr. Willis replied that it is done at the pharmacy.

Chair Wilson asked if the compounding is done by prescription, and Mr. Willis replied that it is.

Chair Wilson asked Mr. Neuhauser if he had looked at this issue when doing his study. Mr. Neuhauser replied that the pricing is difficult to determine and it is a small part – less than 1% -- of pharmaceutical sales. He stated that he would be glad to work with Mr. Willis.

Ms. Baker stated that CHSWC has an ongoing medical study under contract with RAND in which they are looking at re-packaged drugs. The issue of compounding has been raised in this study.

Mr. Gerlach asked if there is any special sort of license required. Mr. Willis responded that technically and legally, any pharmacist can do compounding though most have not been trained. He stated that he is on a joint subcommittee with the State Board and the Department of Health Services to come up with new compounding guidelines.

Adjournment

The meeting was adjourned at 12:00 p.m. The next CHSWC meeting is scheduled for Thursday, April 28, 2005, in Oakland.

Approved:

John C. Wilson, Chair

Date

Respectfully submitted:

Christine Baker, Executive Officer

Date